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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

Case No. 931.

LYNCHBURG TRAFFIC BUREAU, a corporation,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

and

NORFOLK & WESTERN RAILWAY COMPANY, *et al.*
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

MOTION TO AFFIRM.

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Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

Motion to Affirm.

The Appellee railroads, Norfolk and Western Railway Company, Chesapeake and Ohio Railway Company, Carolina, Clinchfield and Ohio Railway, Interstate Railway Company, The Kanawha Central Railway Company, Winifrede Railway Company, Campbell's Creek Railroad Company, Kelley's Creek and Northwestern Railroad Company, The New York Central Railroad Company, and Southern Railway Company, are parties to this appeal by virtue of having been permitted to intervene in the proceedings before the United States District Court for the Western

District of Virginia by order of such court dated June 18, 1963.

These Appellees hereby move that the judgment of such District Court be affirmed on the ground that the questions on which the decision of the cause depends are so unsubstantial as to need no further argument.

Background and Nature of the Proceedings.

The rail Appellees are advised that motions to affirm will be filed by the other Appellees herein, United States of America and Interstate Commerce Commission, and will endeavor, therefore, to avoid unnecessary repetition of the facts and arguments made in such motions.

The pertinent facts as they appear from the report of the Commission and the opinion of the District Court reproduced as Appendices A and B to the Jurisdictional Statement are so clearly set forth in such report and opinion that they need no extensive recital here.

It must be emphasized, however, that the rates under attack do not apply on coal generally but rather on the type of coal commonly known as fine coal. As found by the Commission, this type of coal is defined in the various tariffs published by rail carriers in differing ways. There is no standard definition of fine coal. In the tariffs involved in the present case, it is described as "coal which will pass through a bar screen not exceeding one and one-half inches between bars, or its equivalent, a two inch mesh or two inch round perforation". In other tariffs, there are other definitions (Jur. St. 37).

Unlike *lump* coal, *fine* coal is used mainly as a so-called "boiler fuel" in industrial installations such as factories or electric power generating plants. Because of its special usage, fine coal is particularly susceptible to the competi-

tion of other types of fuel such as natural gas or oil. Consequently, the rail carriers, in order to retain this important traffic, frequently find it desirable to reduce their rates on fine coal to a level below those applicable on lump coal in circumstances where the industrial users of fine coal are in a position to substitute the use of oil or natural gas. Such reductions are, of course, made only in the specific situations and to the specific destinations where the competitive elements that call for them exist. There would be no reason for them otherwise (Jur. St. 39).

The Interstate Commerce Commission has consistently held that the publication of fine coal rates below the level of lump coal rates under competitive conditions just described is a matter within the discretion of the carriers, who, in the exercise of such discretion, are permitted to make such reductions but cannot be required to. No violation of Sections 1 or 3 of the Interstate Commerce Act results from such publication. As far as Section 1 is concerned, if the lump coal rates are not above a reasonable maximum level, *ex hypothesis* a lower fine coal rate could not be unreasonably high and, although a fine coal rate might conceivably violate Section 1 by being unreasonably low, no such situation exists or is even alleged to exist in this case. With respect to Section 3, it has long been established that where differences in the rail rates to an allegedly preferred and an allegedly prejudiced destination are attributable to the competition of other forms of fuel or other forms of transportation existing at one destination and not at the other, such differences in the competitive situation create dissimilar circumstances and conditions and consequently, the rates do not result in undue or unreasonable preference or prejudice within the meaning of Section 3.

It is against this background that the Commission found that publication by the rail Appellees of fine coal rates to Lynchburg on the same level as the fine coal rates to Danville was lawful and accordingly dismissed the complaint (Jur. St. 42-47). The District Court properly upheld the Commission (Jur. St. 29-31).

The Questions Propounded by Appellant are Unsubstantial.

Appellant presented three questions in its Jurisdictional Statement (Jr. St. 2, 3). The first two refer to the holdings of the Commission and the District Court with respect to the issues arising under Section 1 of the Interstate Commerce Act. The third question apparently relates to the Sections 2 and 3 issues.

It is clear that the gist of Appellant's complaint as described throughout its Jurisdictional Statement is the same as it was in the Commission and Court phases of the case. Appellant contended in the proceedings below, as it contends in its Jurisdictional Statement (pp. 6 and 7), that the fine coal rates to Lynchburg are unlawful under the Interstate Commerce Act because such fine coal rates do not bear the same relationship to the lump coal rates to Lynchburg that the fine coal rates to Danville bear to the lump coal rates to Danville. This, according to Appellant, renders the Lynchburg fine coal rates unlawful "as a matter of law". Accordingly, as the District Court held, Appellant considered it unnecessary to introduce any substantial evidence either to show that the fine coal rates to Lynchburg are above or below a reasonable level or that there is any competition between the fine coal consumers at Lynchburg and the fine coal consumers at Danville or

between Lynchburg and Danville themselves as far as the consumption of fine coal is concerned (Jur. St. 27).

As both the Commission and the District Court found, Appellant's entire argument is predicated on the fallacious assumption that the Commission has prescribed a rate relationship or differential on *lump* coal between Lynchburg and Danville, and it is from this premise that Appellant concludes that a similar relationship does or should exist on the *fine* coal rates to the same destinations (Jur. St. 28, 43, 44). The Commission, construing its own decisions, found that no such relationship has ever been prescribed or exists between either the *lump* or *fine* coal rates to the two points (Jur. St. 43-44). Therefore, since Appellant failed even to allege, much less prove, that the fine coal rates to Lynchburg were above a maximum reasonable level or that fine coal consumers in Lynchburg were in competition with fine coal consumers at Danville or that the rail and natural gas competitive conditions at Danville and Lynchburg were similar, the complaint was dismissed. The District Court properly upheld the Commission (Jur. St. 28-31, 42-47).

This appeal clearly presents no substantial question warranting review by this Court. This Court has held that it is the Commission that has the primary responsibility to determine the lawfulness of rail rates. *Mississippi Valley Barge Line Company* v. *United States*, 292 U. S. 282. It is also for the Commission to determine whether, under its own decisions, rate relationships in fact have been established between various points and what the permissible range of rates within such relationships may be. *New York* v. *United States*, 331 U. S. 284; *Ayrshire Collieries Corporation* v. *United States*, 335 U. S. 573, 592-593. In this instance, no substantial factual evidence was presented by Appellant who, throughout all phases of these

proceedings, relied exclusively on the contention that the rates at issue are unlawful because of alleged Commission prescribed relationships. On the other hand, evidence justifying the rates was introduced by the rail carriers. Certainly, therefore, the Commission's finding that it has never prescribed any such relationships and that the rates are lawful presents no substantial question for this Court. The Commission decisions cited by Appellant demonstrate on their face that the Commission has never prescribed a specific relationship in either lump coal or fine coal rates between the mine origin groups and Lynchburg and Danville; that the Commission has merely prescribed at one time or another maximum reasonable rates on lump coal to one or the other of these points; and that it has prescribed no rates whatever on fine coal. The interpretation by the Commission of its own decisions, which is the only thing Appellant is in reality complaining about before this Court, creates no question with which the Supreme Court need be concerned.

The Court Below Properly Disposed of all Issues.

It Was Correctly Found That The Alleged Relationships Between the Lump Coal And Fine Coal Rates Does Not Exist And That The Fine Coal Rates to Lynchburg Are Not In Violation Of Section 1.

The Commission's two principal decisions on coal rates to Lynchburg and Danville in recent years are described in its report and in the District Court decision (Jur. St. 27-28, 35-37, 39). The Commission in *Ashland Coal and Ice Company, Inc.* v. *Atlantic Coast Line Railroad Company, et al.*, 256 I. C. C. 429 (1943), prescribed the present maximum lump coal rates to Lynchburg. The present maximum coal

rates to Danville were prescribed in an altogether different proceeding, *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I. C. C. 291 (1948). Fine coal rates were not at issue in either case. Nowhere in the Commission's reports in these cases, or in any others dealing with coal to Lynchburg and Danville, has the Commission fixed any rate relationship between Lynchburg and Danville as far as any kind of coal rates are concerned. In the *Ashland* case, *supra*, the Commission considered the Lynchburg rates in relationship to the rates to such points as Buena Vista, Va., Charlottesville, Va., and Farmville, Va., rather than Danville which was not even mentioned in this connection. In the *Carolina Coal Consumers Conference* case, rates prescribed were rates to Danville and the Carolina points. No rate was prescribed to Lynchburg, which was not at issue in that proceeding, and although rates to various points in Virginia, North Carolina, South Carolina and Georgia were referred to for purposes of comparison, the basis and rationale of the Commission's decision did not rest upon the prescription of any rate relationship between the destinations directly involved in the case and other specific destinations such as Lynchburg.

Nor do the other cases found in the rate "history" relied upon by Appellant in its Jurisdictional Statement (pp. 3-5, 11-12), support Appellant's contention in this respect. None of such cases involved rates on fine coal. They merely show that at different times, different maximum rates have been prescribed on lump coal to Danville and in so doing, the Commission sometimes made rate comparisons involving Lynchburg and many other points. It is noteworthy that in none of these cases did the Commission hold that it was unlawful for rates to Danville

and Lynchburg to be on the same level, as the fine coal rates to the two points are at the present time.

It is clear, therefore, that since the alleged *lump* coal rate relationship between Lynchburg and Danville has never been prescribed by the Commission, it can hardly serve as the basis for Appellant's contention that *fine* coal rates to the two destinations should be related in any particular way. The Commission has never prescribed any fine coal rates to Lynchburg, Danville or any other point referred to or involved herein. It correctly found that the carriers, if competition with other fuels or other carriers or forms of carriage renders it advisable, may publish lower rates on fine coal than on lump coal so long as such fine coal rates do not fall below a minimum level of reasonableness, but that the Commission has consistently declined to require them to do so (Jur. St. 43). This has been the rule for many years. See *Midland Electric Coal Corporation* v. *Chicago & North Western Railway Co.*, 215 I. C. C. 562, 577; *Eastern Class Rate Investigation*, 164 I. C. C. 314, 382; *South Chicago Coal and Dock Co.* v. *Chicago, S. L. Ry. Co.*, 223 I. C. C. 619, 622.

Never having required the publication of *any* fine coal rates from the origins involved in this case, the Commission has, of course, never fixed any relationship between fine coal rates from such origins to Danville or Lynchburg or any other destination. Nor has it prescribed what differences, if any, must exist between fine coal rates and lump coal rates from any origin served by Appellees to any specific destination. As far as Section 1 is concerned, the publication of fine coal rates to any given destination is a matter within the discretion of the carriers who are free to exercise such discretion where they deem it advisable in light of competition from other fuels or other carriers or

forms of carriage. As the Supreme Court said in *Barringer & Co.* v. *United States*, 391 U. S. 1, 7:

> "It has long been established by our decisions that differences in competitive conditions may justify a relatively lower line-haul charge over one line than another, and that it is for the Commission, not the courts, to say whether those differences are sufficient to show that a difference in rates established to meet those conditions is not an unjust discrimination or otherwise unlawful."

As for the factual evidence, Appellant offered nothing to prove that the fine coal rates to Lynchburg are above a reasonable maximum level and did not even contend that they fall below a reasonable minimum level within the meaning of Section 1. Appellant, therefore, apparently concedes that they fall within the "zone of reasonableness" within which a carrier is free to adjust its charges for itself. See *United States* v. *M., St. P. & P. R. Co.*, 294 U. S. 499. In any event, the evidence introduced by the rail Appellees showed affirmatively by comparison with other fine coal rates that the Lynchburg fine coal rates are not above a reasonable maximum. Further, Appellant itself urges that the lump coal rates to Lynchburg be used as a measuring rod for what it contends would constitute a proper level for the fine coal rates, and therefore concedes by clear implication that the Lynchburg lump coal rates are not excessively high. It follows, therefore, that the publication of fine coal rates to Lynchburg on a lower level than the lump coal rates could not possibly produce a fine coal rate that exceeds a maximum level of reasonableness or is otherwise in violation of Section 1 and that the Commission was correct in so finding.

It Was Correctly Found That The Rates At Issue Are Not In Violation Of Section 2 of the Interstate Commerce Act.

No substantial question arises with respect to the findings on the alleged violation of Section 2 of the Interstate Commerce Act. It is fundamental that Section 2 applies only when the transportation is from and to the same points and has no application whatever to rates applying to such widely separated destinations as Lynchburg and Danville, *Ayrshire Collieries Corporation* v. *United States, supra; Interstate Commerce Commission* v. *Western & A. R. R.*, 88 Fed. 186, aff'd. 93 Fed. 83, modified on other grounds 181 U. S. 29; *Lawrenceville Cooperage Company* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 773, 781; *Carr Wood Industries, Inc.* v. *Alton & S. R.*, 263 I. C. C. 611, 616; *Miller Waste Mills Inc.* v. *Chicago, M., St. P. & P. R. Co.*, 226 I. C. C. 451, 453. The Commission and the District Court correctly so held (Jur. St. 29-30, 44). Moreover, the fine coal rates to both Lynchburg and Danville are the same and therefore, there could be no possibility of finding that the rail Appellees are charging any person a "greater or less compensation for any service rendered" than they are charging any other person within the meaning of Section 2.

It Was Correctly Found That The Rates Are Not Unlawful Under Section 3 Of The Interstate Commerce Act.

Nowhere in its Jurisdictional Statement does Appellant contend on the Section 3 issue that it proved the existence of any competition between Lynchburg and Danville or among any fine coal consumers therein that could possibly give rise to undue or unreasonable preference or prejudice within the meaning of Section 3. Appellant now states, however, that the rail carriers introduced no evidence before the Commission to show that the rate disparity was

not the cause for smaller growth in Lynchburg (Jur. St. 8). But, of course, it was Appellant that had the burden of proving that Lynchburg or shippers located therein were placed at a competitive disadvantage by reason of having the same rates on fine coal as apply at Danville. A mere showing of the rates to two points, even where a difference exists, does not prove a violation of Section 3. *Board of Trade* v. *United States*, 314 U. S. 534, 546. It was Appellant's burden to show, through evidence of competition between the persons or localities in question, that unjust or undue prejudice or preference exists. *United States* v. *Illinois Central R.R. Co.*, 263 U. S. 515, 524; *Manufacturers R. Co.* v. *United States*, 246 U. S. 457; *Texas & Pacific Railway Company* v. *Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission* v. *Baltimore & O. R.R. Co.*, 43 Fed. 37, aff'd 145 U. S. 263.

In this instance Appellant failed completely to go beyond the most general allegations of competition. The Commission accordingly would have been justified in dismissing the Section 3 allegation on mere failure of proof, but the validity of its action does not rest on this ground alone. Actually, the record contained positive evidence that no competition exists. It was supplied by the Appellee railroads as the Commission found in its report (Jur. St. 42). Appellant, despite every opportunity to do so, offered no evidence to contradict or rebut Appellees' proof on the issue of competition, presumably because none exists. It is plain, therefore, that the record showed no competitive situation between the Lynchburg and Danville points or among any persons in the two points that could possibly justify a finding that the identical fine coal rates to Lynchburg and Danville are in violation of Section 3.

The Commission made a further finding that the competition from natural gas and from other carriers at Dan-

ville has no counterpart at Lynchburg and that this requires a finding that no violation of Section 3 exists. Appellant seems to suggest in its Jurisdictional Statement (p. 13), that the Commission's findings in this respect were the sole basis for its conclusion that there was no violation of Section 3. This is obviously incorrect since, as its report shows (Jur. St. 45-46), the Commission also found that no competition between Lynchburg and Danville within the meaning of Section 3 was shown to exist. In any event, the rail carriers presented evidence to the effect that competitive conditions existing at Danville and at Lynchburg differ with respect to competition from natural gas and from other rail carriers and specifically showed that Lynchburg lacks gas supply in the same degree as that of Danville by reason of the denial by the Federal Power Commission of Lynchburg's request for a greater supply of natural gas. See *Lynchburg Gas Company* v. *Federal Power Commission*, 275 F. 2d 847. No effort was made by Appellant to disprove this in the evidence it was permitted to file and actually did file in rebuttal. The evidence before the Commission clearly demonstrated therefore that the fine coal rates to Danville and beyond are designed to meet competitive influences not present at Lynchburg, and it is plain that the circumstances and conditions surrounding the transportation of fine coal to Lynchburg and to such other destinations are therefore dissimilar. As the District Court properly held:

> "This is unquestionably a lawful ground for the difference in rates. On this evidence and the determination that the rates are not otherwise unjust or unreasonable, the Commission has found that there was no preference or prejudice. This conclusion we cannot say is unwarranted in fact or in law. Thus it is binding upon the court. Board of Trade *v.* United States, 314 U. S. 534, 546 (1942)."

One further point may be added. The Commission's findings regarding the alleged violation of Section 3 can also be sustained on the ground that the fine coal rates complained of are the same to Lynchburg as they are to Danville. It is impossible to see how Danville is preferred and Lynchburg prejudiced when they both enjoy exactly the same rates. In other words, even assuming that a receiver in Lynchburg was in competition with a receiver at Danville, it can scarcely be contended that the Danville receiver is preferred over his Lynchburg competitor when both are paying the same rate. The Commission has properly held that no violation of Section 3 occurs under these circumstances. See *American Round Bale Press Co.* v. *A., T. & S. F. Ry. Co.*, 32 I. C. C. 458, 463; *Moline Consumers Co.* v. *Chicago, B. & Q. R. Co.*, 213 I. C. C. 135, 157.

Conclusion.

Since it is evident that the appeal herein presents questions which are neither novel or substantial, it is respectfully submitted that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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